United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1136

B Pgs

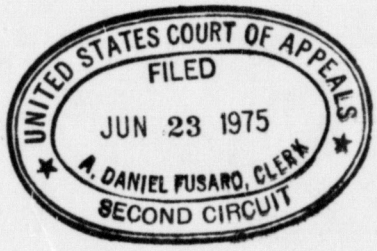
To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- THOMAS MURPHY and ROBERT WIDMAN, Appellants.	Docket No. 75-1136

REPLY BRIEF FOR APPELLANT
ROBERT WIDMAN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ROBERT WIDMAN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel

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The Government responds to appellant Widman's position that the in-court identification of appellant was due to suggestive pre-trial procedures by arguing that the procedures were not suggestive; that, if they were, the witnesses were not affected by the suggestiveness; and that the degree of accuracy of the in-court identification was for the jury to determine.

1. Suggestive photographs and lineup

The Government does not dispute what the photographs of the six men present to the eye: that the hairstyle and neck girth attributed to the robber are uniquely present in the photograph of appellant. In the photographs of the other five men, the hair is flat; appellant's photograph shows hair curled up in the front and a hairline uniquely fitting to that style. As the Government concedes, the hairstyle is the differentiating feature.

As the Government's brief ironically takes pains to note (Br. at 31, n.45), in the set of photographs in which the hairstyle on the photograph of appellant was blurred, the witnesses were unable to make an identification.

The Government relies on United States v. Reid, slip op. 3073, Doc. No. 74-2598-99 (2d Cir., April 24, 1975), to argue that there is no requirement that the accused be surrounded by people nearly identical. However, United States v. Fernandez, 456 F.2d 638, 641 (2d Cir. 1972), makes clear that the critical features like hairstyle and skin color must be approximated.*

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*Whatever the efforts of the Government to create a fair identification procedure (see Government Br. at 31, n.43), these effects are required and expected, and the Government gets no bonus points for effort. As United States v. Messina, 507 F.2d 73, 76 (2d Cir. 1974), says, the efforts must succeed. Further, the Government's position that it need not conduct a lineup on request is not the law. United States v. Smith, 473 F.2d 1148 (2d Cir. 1972); see also United States v. Ravich, 421 F.2d 1196, 1202-1203 (2d Cir. 1972); cf., United States v. Fernandez (I), supra, 456 F.2d at 641.

2. Witnesses' reliance on features

The record shows that the Government misstates the testimony concerning the impact of the hairstyle on the witnesses. Mrs. Jonke did not only say that the robber's hair was ruffled, but that it was "ruffled up high" (Tr. 42), and she said no other photograph had a similar hairstyle (43). She also said that no one in the lineup had a similar hairline or hairstyle (44). The Government misstates her testimony when it states she did not rely on hairstyle.

Mrs. Daly's testimony went further to state that her selection was based on the fact that the hairstyle, hairline, and weight were all joined only in appellant's photograph and in his person as he appeared at the lineup. If others were heavy and had receding hairlines, the hairstyle thus must have been the determining feature in her selection.

Mr. Medina, the witness who observed the Cadillac outside the bank on the days before the robbery, recalled that one of the men had a curl up front in his hair. The only photograph in the group of large glossy photos with a curl is appellant's. Critically, the other testimony connecting appellant to Murphy is of events after the robbery, and in no way establishes appellant's participation in the robbery. Thus, if the identification testimony is improper, the conviction must be reversed.

3. The "degree of accuracy" of the identification testimony.

The Government appears to argue that it was proper to permit the witnesses to make an in-court identification because the pre-trial procedures were not suggestive. Obviously appellant challenges the position that the procedures were fair and it is on that premise that appellant urged that the in-court identification be excluded.*

However, even to take the Government on its own terms, the in-court identification must be excluded. The witnesses stated they did not see the robber's face. Thus, from their own knowledge they could match only the limited characteristics they saw. They had not made the further observation necessary to enable them to express an opinion on the ultimate issue. The striking difference between this case and United States v. Evans, 484 F.2d 1178 (2d Cir. 1973); United States v. Fernandez (II), 480 F.2d 726 (2d Cir. 1973), and United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974), is that in those three cases it was found that there was a viewing from which the witness could express his opinion on the ultimate issue. Judge Mishler's charge fails to make this distinction, for he tells the jury how to evaluate the identification testimony, assuming there has been an identification.

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*Judge Mishler might have had some doubts as well, for he states in his opinion that the procedures were not "fully suggestive.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant Widman, the judgment of the District Court must be reversed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ROBERT WIDMAN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

CERTIFICATE OF SERVICE

June 23, 1975

I certify that a copy of this reply brief for appellant Widman has been mailed to the United States Attorney for the Eastern District of New York.